IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 117

DISTRICT OF COLUMBIA, *Petitioner,*

v.

ELIZABETH C. PACE, *Respondent.*

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

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DIVISION OF PRINTING—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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The petitioner adopts its brief in support of the petition for writ of certiorari as its brief on the merits, and the following supplemental argument and authorities are submitted in support of the points urged therein:

The predominant error of the Court of Appeals is in holding that "A domiciliary determination involves a compound consideration of fact and law" and that it is "privileged to review the legal effect attached to the evidence before the Board" (R. 135), and then proceeding to consider the facts which it deems to be material and substituting its judgment for that of the Board of Tax Appeals.

It is the understanding of petitioner that this Court, in its opinion in the Murphy case,[1] definitely held that domicile is a question of fact for determination by the Board of Tax Appeals. This rule is supported by leading authorities in both England and America.

Dicey and Beale, two leading authorities in England and America on private international law, are emphatic that domicile of choice is a pure question of fact. In his comments on his definition of domicile, Dicey says: "Yet, when-

[1] 304 U. S. 441.

ever a country is termed a person's home, reference is intended to be made to a connexion between two facts, one physical, the other mental. The physical fact is the person's 'habitual physical presence', or, to use a more ordinary term, 'residence' within the limits of a particular country. The mental fact is a person's present intention to reside permanently or for an indefinite period within the limits of such country . . . it should be noted that the conception of the country as a home is in no sense a legal or technical idea since it arises from the relation between two facts, 'actual residence' and 'intention to reside' . . . the question whether a given country is or is not to be considered a particular person's home is in itself a mere question of fact and not of law." [2]

Beale is equally insistent that no question of law is involved: "The determination of a domicile of choice involves the determination of questions of fact, particularly the fact of intention, always a difficult fact to determine. The difficulty, however, it must be emphasized, is one of fact and not of law, . . ." [3]

In a recent article on "Domicil of Choice—'Fact' or 'Law'?" [4] Dr. A. Farnsworth discusses the English and American authorities which hold that the determination of domicile involves the determination of questions of fact and not of law. He concludes that "since an analysis of the two elements constituting domicil of choice shows that both are purely factual, any questions arising on it must equally be pure matters of fact so long as correct legal principles are applied."

The state of a man's mind, his animus or intention, is surely just as much a matter of fact as anything physical; Bowen, L. J., in *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 483, said: "The state of a man's mind is just as much a matter of fact as the state of his digestion. It is true that it is very difficult

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[2] Dicey, Conflict of Laws, Ed. 5, pp. 66 and 68.

[3] Beale, Conflict of Laws, Sec. 15.1. He concludes: "If, therefore, the question of acquisition in fact of a domicile of choice has been left to a jury and there is sufficient evidence to support the verdict reached, and the Court grants a new trial, a higher Court cannot reverse the action in the trial Court." (Vol. 1, p. 132.)

[4] The Law Quarterly Review, July, 1943, Vol. 59, No. 235, p. 219.

prove what the state of a man's mind is, but if it can be ascertained it is as much a matter of fact as anything else."

In the instant case, it is undisputed that the decedent, Charles F. Pace, lived in the District of Columbia at the time of his death and for 27 years prior thereto. The Board of Tax Appeals found that at the time of his death he had no fixed and definite intent to return and make his home where he was formerly domiciled (R. 3). The Board held decedent to be domiciled in the District at the time of his death (R. 4). The function of the Court of Appeals on review is to decide whether the correct rule of law was applied to the facts so found and whether there was substantial evidence before the Board to support such findings.[5]

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[5] Section 4(a) of the Act creating the Board of Tax Appeals for the District of Columbia provides that decisions of the Board may be reviewed by the Court of Appeals, and that "Upon such review the Court shall have the power to affirm, or *if the decision of the Board is not in accordance with law*, to modify or reverse the decision of the Board, with or without remanding the case for hearing, as justice may require." 52 Stat. 371, Sec. 47-2404, D. C. Code, 1940. (Italics supplied.)

See also: Cases cited in Note 28, page 30 of petitioner's brief in support of petition for certiorari; *Wilmington Co.* v. *Helvering*, 316 U. S. 164, 168; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208; *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117.